factors were that the accused was a first offender, had a wife and five children to support and that the drug found in his possession was less deleterious than morphine and heroin.

Order accordingly.

Solicitors: *Lee, Loo & Bakarudin; Maxwell, Kenion, Cowdy & Jones.*

RE RASIAH MUNUSAMY

[R.G.J. (Edgar Joseph Jr.) April 20, 1983]
[Penang – Criminal Revision No. 9 for 1983]

Criminal Law and Procedure – Criminal revision – Private complaint – Issuance of Warrant of Arrest by Magistrate – Magistrate merely called complainant to attest complaint upon oath – Mandatory procedure not followed – Warrant of arrest made without jurisdiction and therefore void – Criminal Procedure Code, ss. 132, 133(i) & 323(i)

The court in this case exercised its powers of revision pursuant to section 323(i) of the Criminal Procedure Code. The record disclosed that in his complaint made under the provisions of sections 32 and 133(i), the complainant alleged that his wife had been enticed away from him for illicit intercourse and that she was being kept in a hotel in Penang by deceit. The record also disclosed that acting merely on the strength of this complaint which was affirmed to before her, and the first information report, the learned Magistrate directed the issue of a Warrant on the same day.

Held: (1) with the exception of complaints of an offence where a summons is applied for by a police officer or a public servant acting officially, the very first thing the Magistrate must do upon receipt of a complaint under section 133(i) (which includes a complaint under section 132) is at once to examine the complaint upon oath and reduce the substance of the examination into writing which shall be signed by the magistrate and the complainant. It is a sort of a preliminary enquiry but care must be taken not to inquire into the case for the defence;

(2) a person complained against is not a party to the proceedings for he is not yet an accused person so he is in no position to claim a right to be represented. However, he is entitled to attend the proceedings like any member of the public though he has no *locus standi* as a party, and a magistrate may, if he so wishes, examine or question him. Care, however, must be taken not to convert the enquiry into a trial before a trial;

(3) it follows, therefore, that merely to call the complainant to attest the complaint upon oath is not sufficient nor would be sufficient to follow this up with an unrecorded and unsworn interview. The requirements given above are mandatory, their object being to enable the magistrate to decide on the veracity of the complaint for upon that will depend his decision as to whether or not a process should issue;

(4) in this case the record clearly showed that there was not even a semblance of compliance with the said requirements. The order by the learned Magistrate directing the issue of a Warrant of arrest in this case was made without jurisdiction and was therefore void.

Cases referred to:

(1) *Teoh Chong Si* v. *Nunn* 11 S.S.L.R. 80.
(2) *Sheikh Chand* v. *Mohamed Hanif* 8 Cr. L.J. 20.
(3) *Jinilal Mandal* v. *Chanderdeo Prosad* A.I.R. 1941 Pat. 419.
(4) *Manindra Nath* v. *Anil Chandra* A.I.R. 1953 Cal. 689.

Cur. Adv. Vult.

Edgar Joseph Jr. J: I decided to exercise my powers of revision in this case pursuant to the provisions of section 323(i) of the *Criminal Procedure Code* ("the Code") because I was amply satisfied that there had been a clear misuse of legal powers in the issue of a warrant of arrest.

For the sake of brevity and convenience, all references to statutory provisions in this judgment, unless otherwise expressly stated, are to the Code.

A scrutiny of the record disclosed that in his complaint which was made under the provisions of sections 132 and 133(i), affirmed to on 15/4/83, the complainant alleged that his wife had been enticed away from him for illicit intercourse and that she was being kept in a hotel in Penang by deceit. I thought this was a typical example of swearing by the book, but, be that as it may, the first information report which was made by the complainant the night before at Penang was somewhat fuller and its essential parts were as follows:–

"My wife ... was taken away to Penang without my knowledge with intent that she may have illicit intercourse with him. I believe he has concealed and detained her in a hotel in Penang and they are expected to stay in Penang for three days. I seek police help to obtain a warrant and charge him vide section 493 and section 498 of the Penal Code. I believe my wife has already committed adultery with him."

The record also disclosed that acting merely on the strength of this complaint, which was affirmed to before her, and the first information report, the Magistrate without further ado directed the issue of a warrant on the same day.

Now, with the exception of complaints of an offence where a summons is applied for by a police officer or a public servant acting officially, the very first thing the magistrate must do upon receipt of a complaint under section 133(i), and that of course includes a complaint under section 132 which provides specially for offences of entice-

ment of spouse in contravention of section 498 of the *Penal Code,* is at once to examine the complainant upon oath and reduce the substance of the examination into writing which shall be signed by the magistrate and the complainant. It is a sort of a preliminary enquiry but care must be taken not to inquire into the case for the defence: *Teoh Chong Si* v. *Nunn*[1]. Consequently, the letter written by a firm of solicitors on behalf of the person complained against in this case containing exculpatory statements was rightly disregarded by the learned Magistrate and I would add, that in any case, it was also objectionable as its contents were hearsay and unsworn.

A person complained against is not a party to the proceedings for he is not yet an accused person so he is in no position to claim a right to be represented. However, he is entitled to attend the proceedings like any member of the public though he has no *locus standi* as a party: *Sheikh Chand* v. *Mohamed Hanif*[2], and a magistrate may, if he so wishes, examine or question him: *Jinilal Mandal* v. *Chanderdeo Prosad*[3]. But, again, care must be taken not to convert the enquiry into a trial before a trial. I am aware that there is some conflict of authority in India as to whether it is irregular to call upon the person complained against to be present at the enquiry and to question him but I consider that exceptionally where the magistrate considers it is essential to do so, he may exercise that power, always taking care to ensure that the right of silence is not abrogated: *Manindra Nath* v. *Anil Chandra*[4].

It follows, therefore, that merely to call the complainant to attest the complaint upon oath is not sufficient nor would it be sufficient to follow this up with an unrecorded and unsworn interview. There is no doubt that the requirements I have outlined above are mandatory, their object being to enable the magistrate to decide on the veracity of the complaint for upon that will depend his decision as to whether or not a process should issue. It goes without saying that this is a serious matter since the indiscriminate issue of process encourages mischievous and malicious complaints resulting in harassment to the person complained against and a waste of public time and money as far as the courts are concerned. This is why it is essential that the statutory prerequisites are rigidly and meticulously complied with. There is a wealth of Indian authority to support this proposition and they are conveniently collected in the *A.I.R. Commentaries on the Indian Criminal Procedure Code* by Chitaley and Rao, 7th ed., Vol. 2, pp. 473 *et seq.*, dealing with section 200 of the Indian Code which is *in pari materia* with our section 132.

The record provided also showed clearly that there was not even a semblance of compliance with the requirements to which I have already adverted. I accordingly did not have the slightest hesitation in concluding that the order by the learned Magistrate directing the issue of a warrant of arrest in this case was made without jurisdiction and was therefore void.

There were further grounds for impugning the order of the learned Magistrate and the warrant pursuant to which it was issued.

The complaint and the report do not contain admissible evidence of a taking with intent that the wife may have illicit intercourse with any person, an essential ingredient of the offence under section 498 of the *Penal Code.* The complaint, shorn of introductory and formal parts, was given in just over five lines and reads as follows:—

> "I believe he has concealed and detained her in a hotel in Penang and they are expected to stay in Penang for three days I believe my wife has already committed adultery with him."

The allegations in the report which read:

> "I believe he has concealed and detained her in a hotel in Penang and they are expected to stay in Penang for three days"

> "I believe my wife has already committed adultery with him"

made it clear that the complainant had no personal knowledge of these essential averments which were worthless as evidence being plainly hearsay. There is not even a disclosure of the grounds for such belief. Once these flaws are recognised as being of primary importance the entire complaint loses its sting.

The remaining defects in the complaint may be dealt with shortly. The marriage certificate, although specifically referred to in the complaint with its number and date quoted, does not appear to have been produced for inspection by the Magistrate. Nor is it anywhere alleged that the person complained against knew or had reason to believe that the lady concerned was the complainant's wife. These are also essential elements of an offen-

ce under section 498 of the *Penal Code,* and in the absence of such evidence I again fail to see how it could be said that a *prima facie* case was established.

For the foregoing reasons, I quashed the order authorising the issue of the warrant and directed that the warrant itself, if issued, but not yet executed, should be recalled with immediate effect and cancelled.

I should add that the complainant in this case is not without remedy. Having regard to the circumstances, especially, as he had lodged a police report, the time that has elapsed since then and the fact that there is no reason to suppose that the person complained against is likely to abscond, the far better course would be for him to let the police investigate by virtue of the provisions of section 108(ii) which requires an order from the Public Prosecutor for this purpose. If, as a result of this investigation, the police are satisfied as to the truth of the report and/or complaint, a prosecution should follow. If, on the other hand, the investigation discloses that they or either of them was made knowingly falsely, then, of course, the complainant would be liable to prosecution under sections 182 and 193 of the *Penal Code.*

This is sufficient to dispose of the revision but as issue of process pursuant to section 132(i) is a regular occurrence in the Subordinate Courts in this country and, in view of the dearth of local authority on the subject, it may not be inappropriate if I made some further general observations thereon.

I should, however, preface my remarks with the qualification that what is about to be said is meant to apply only to complaints to magistrates, by persons other than police officers or public servants acting in their official capacity, which contain allegations of the commission of an offence in respect of which a warrant should issue in the first instance by virtue of column 4 of the First Schedule to the Code.

The magistrate having conducted the examination of the complainant in accordance with the requirements of section 133(i) may conclude that he has "reason to doubt the truth of the complaint" in which case he may postpone the issue of process to enable inquiries to be made either by himself or, what is probably far more feasible in practice, by the police who will in due course, report to him the result of such inquiries: (section 134).

Another possible result of the examination by the magistrate of the complainant under section 133(i) may be that the magistrate finds "no sufficient ground for proceeding" in which case he would simply dismiss the complaint but taking care to record his reasons for doing so: (section 135(i) and (ii)).

If, on the other hand, the magistrate after having dealt with the case in the manner prescribed by section 133(i) is satisfied that a *prima facie* case is disclosed by the complaint, it does not follow that he is bound to issue a warrant for he clearly has a discretion, if he thinks fit, to issue a summons for causing the accused to appear in Court instead of a warrant: section 136(ii). In exercising his discretion in the matter, the magistrate will, no doubt, amongst other considerations, take into account not only the nature of the offence, but also, the probability, of the person complained against absconding, whether an element of urgency is involved, as for instance, where the immediate issue of a warrant may lead to such person being apprehended in incriminating circumstances.

Order accordingly.